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No. 8, ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF ARIZONA,
COMPLAINANT

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,
DEFENDANTS

THE UNITED STATES OF AMERICA AND STATE OF NEVADA,
INTERVENERS

STATE OF UTAH AND STATE OF NEW MEXICO,
IMPLEADED DEFENDANTS

COLORADO RIVER INDIAN TRIBES, FORT MOJAVE INDIAN TRIBE, CHEMEHUEVI INDIAN TRIBE, COCOPAH INDIAN TRIBE, AND FORT YUMA (QUECHAN) INDIAN TRIBE,
RECOMMENDED INTERVENERS

Exception of the State of Arizona to the Report of Special Master Tuttle dated February 22, 1982 and Brief in Support of Exception.

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No. 8, Original

In the Supreme Court of the United States

October Term, 1981

State of Arizona,
COMPLAINANT

v.

State of California, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, The Metropolitan Water District of Southern California, City of Los Angeles, California, City of San Diego, California, and County of San Diego, California,

DEFENDANTS

The United States of America and State of Nevada,

INTERVENERS

State of Utah and State of New Mexico,

IMPLEADED DEFENDANTS

Colorado River Indian Tribes, Fort Mojave Indian Tribe, Chemehuevi Indian Tribe, Cocopah Indian Tribe, and Fort Yuma (Quechan) Indian Tribe,

RECOMMENDED INTERVENERS

Exception of the State of Arizona to the Report of Special Master Tuttle dated February 22, 1982 and Brief in Support of Exception.

INTRODUCTION

Arizona files this separate brief in that there are certain issues which pertain only to Arizona and are not shared in common with the other State Parties. To the extent possible the State Parties have filed joint briefs, but Arizona

supplements that brief and adds to it as deemed necessary. All issues in both the joint brief and this separate brief are of significance and importance to the State of Arizona, and it concurs in the joint brief.

RES JUDICATA, COLLATERAL ESTOPPEL AND LAW OF THE CASE

EXCEPTION:

Arizona excepts to the Master's refusal to apply the preclusion doctrines of Res Judicata, Collateral Estoppel and Law of the Case to claims for increases in the 1964 decreed amounts for Indians on lands admittedly within the reservation boundaries at the time of the 1964 decree. ("Omitted Lands.")

PROPOSED FINDING:

The United States represented the Tribes, who are now parties in these proceedings in their role as trustee for the Tribes and therefore privity existed between the United States and the Tribes. All claims for irrigable acreage on the reservations were or should have been presented by the United States on behalf of the Tribes and the 1963 decision and 1964 decree of this Court are binding upon the United States and the Indian Tribes as to any claim for increased water rights on all lands which were within the Reservation boundaries as of the 1964 decree of this court.

PROPOSED ACTION:

That this Court enter its decision and order that the 1963 decision, and 1964 decree of this Court are binding upon the parties as to amounts of water decreed for Indian use on all lands located within the boundaries of the reservations as of the time of the 1964 decree.

ARGUMENT

A. Introduction

Shortly after the current proceedings were assigned by this Court to Special Master Tuttle the State Parties presented a motion to preclude the presentation of evidence relative to so-called "omitted lands." This motion was based upon the preclusion doctrines of res judicata, collateral estoppel, and law of the case. That motion was dated September, 1980. Thereafter, the Master ruled that he would defer a decision upon this motion until all evidence had been presented. The State Parties position was that since so-called "omitted lands" concerned lands which were admittedly within the Reservation boundaries as of the time of the 1964 Decree, the United States and the Indian parties were precluded from presenting evidence related to those lands.

B. Discussion of Law of Preclusion Doctrines

1. *General Discussion*

The doctrines of res judicata and collateral estoppel are related doctrines, sometimes referred to as "issue" or "claim preclusion." These doctrines serve the public policy of preventing continuous relitigation of matters once litigated. Justice, expediency and the preservation of public tranquality require that a matter once litigated be at an end. *Schroeder v. 171.74 Acres of Land, More or Less*, 318 F.2d 311 (8th Cir. 1963); See, *Texaco, Inc. v. Hickel*, 437 F.2d 636, 644 (D.C. Cir. 1970):

> It is sound and important policy in the administration of justice that what has already been done and determined not be redone and redetermined unnecessarily. This policy requires that courts not be niggardly in giving full effect to prior determinations of fact and right.

This Court had reason to consider res judicata in 1974 in *Sea Land Services, Inc. v. Gaudet*, 414 U.S. 573, 578-79 (1974), and stated:

> For res judicata operates only to bar 'repetitious suits involving the same cause of action. [The bar] rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissable matter which might have been offered for that purpose. *Cromwell v. County of Sac*, 94 US 351, 352 [24 L Ed 195]. The judgment puts an end to the cause of action, which cannot again be brought into litigaton between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. *See* Von Moschzisker, Res Judicata, 38 Yale L J 299; Restatement of the law of Judgments, §§ 47, 48. *Commissioner v. Sunnen*, 333 US 591, 597, 92 L Ed 898, 68 S Ct 715 (1948).'

A final judgment on the merits of those matters which were actually litigated and all matters which could have been litigated is binding upon the parties and their privies. See *Commissioner v. Sunnen*, 333 U.S. 591 (1974); *Cromwell v. Sac County*, 94 U.S. 351 (1876); *Montana v. United States*, 440 U.S. 147 (1979); and *Lawlor v. National Screens Service Corp.*, 349 U.S. 322 (1955).

2. *Parties or Those in Privity*

The United States in the first trial of this matter represented the Indians as their trustee. In this capacity the United States binds the Indian tribe and the individual Indians. *Heckman v. United States*, 224 U.S. 413, 445-56 (1912), and *United States v. Truckee-Carson Irrigation*

District, 649 F.2d 1286 (9th Cir. 1981); see also *United States v. Emmons*, 351 F.2d 603 (9th Cir 1965); *Oklahoma v. United States*, 155 F.2d 496 (10th Cir. 1946). *Sea-Land Services, Inc. v. Gaudet, supra*, also decided that not only parties to the litigation but those in privity with parties are bound.

3. *Issues Presented or Which Could Have Been Presented*

In *Sea-Land Services, Inc. v. Gaudet, supra*, this Court decided that any matter which was presented or any other admissible matter which might have been offered are precluded by the doctrine of res judicata.

Not only have the courts indicated that matters which could have been raised will be precluded, but they have also imposed an affirmative duty to raise all claims that are a part of or a defense to an asserted cause of action. *Aero Jet-General Corporation v. Askew*, 511 F.2d 710 (5th Cir. 1975), cert. denied, 423 U.S. 908 (1975); *Landrum v. Time D.C. Inc.*, 407 N.E.2d 777 (Ill. App. 1980).

That the United States on behalf of the Indians consciously made a decision to present only the evidence which it presented at the trial despite the fact that there may have been other so-called irrigable acreage on the Reservations is made clear by the following exchange between Master Rifkin and Mr. Warner, the United States Attorney in the previous trial:

THE MASTER: The question is whether the maps constitute the definition of what you regard as irrigable . . . .

MR. WARNER: Well that is how we are defining 'irrigable' for the purpose of proving the claim that is being asserted.

THE MASTER: And although there may be other irrigable lands within those reservations, those you do not lay claim for the service of water upon?

MR. WARNER: That is correct.

THE MASTER: Alright. That is ... the way we are going to be bound. This is a statement that I will take seriously." (Tr. at 14155)

Yet now the United States and the Indian Tribes suggest that because of "inadvertent omissions, as well as erroneous judgment, in identifying irrigable acreage . . .," (see Motion of United States for Modification of Decree and Supporting Memorandum, dated December 21, 1978), the issues should be relitigated despite affirmatively announcing to Master Rifkin that even though there was other irrigable land within the reservations, they did not intend to lay claim for service of water upon those. The current United States' attorneys seek to label that conduct as an inadvertent omission. It was anything but inadvertent, rather it was a conscious decision.

4. *Same Cause of Action*

Courts have developed three tests which may be used to determine whether the same cause of action is involved. Application of each of those three tests clearly shows how the present claim is part of the same cause of action litigated previously.

One of the most common tests is the "impairment of rights" test:

> A judgment in one action is conclusive in a later one not only as to any matters actually litigated therein, but also as to any that might have been so litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first. *Schuykill Fuel Corp. v. B. & C. Nieberg Realty Corp.*, 250 N.Y. 304, 165 N.E. 456, 457 (1929); cited

with approval in *Ripley v. Storer*, 132 N.E.2d 87 (N.Y. 1956); *Herendeen v. Champion International Corp.*, 525 F.2d 130 (2nd Cir. 1965); and *Hanson v. Hunt Oil Co.*, 505 F.2d 1237 (8th Cir. 1974).

The impairment of the States' rights in this case is obvious. "When ... a river is fully appropriated federally reserved water rights frequently require a gallon-for-gallon reduction in the amount of water available for water needy states and private appropriators." *United States v. New Mexico*, 438 U.S. 696 (1978). In this case each additional gallon of water which is appropriated to the tribes *will* result in one less gallon of water available for use by the State Parties. The magnitude of the impairment becomes obvious when the scarcity of western waters and the importance of the Colorado River are considered. It is not and cannot be disputed that the Colorado River serves the area as the primary source for allocating a scarce area resource.

A second test used to compare causes of action is the "operative facts" test. As indicated in *Rhodes v. Jones*, 351 F.2d 884, 886 (8th Cir. 1965), "[t]he word claim denotes ... the aggregate of operative facts which give rise to a right enforceable in the courts." Where the aggregate of operative facts which give rise to the right has not changed, the asserted claim involves the same cause of action. It is important to note that attention is to be focused on the facts which give rise to a right, not the evidence that would prove the basis for recovery.

The present omitted lands claim arises out of the same operative facts which gave the United States the right to claim water rights twenty years ago. Those operative facts can briefly be summarized as:

1. The United States' desire to divert water from the Colorado River for Federal purposes, including water for use on the reservations;

2. The right to such waters is based upon the federal reserved water rights enunicated in *Winters v. United States*, 207 U.S. 564 (1908); and
3. The amount of water which is to be reserved is based upon the practicably irrigable acreage on the reservations.

The practicably irrigable standard was adopted by the Supreme Court when it stated:

> We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the *water was intended to satisfy the future as well as the present needs of the Indian Reservations* and ruled that *enough water* was reserved *to irrigate all the practicably irrigable acreage on the reservations*... We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservation can be measured is irrigable acreage. The various acreages of irrigable land which the Master found to be on the different reservations we find to be reasonable. *Arizona v. California*, 373 U.S. 546, 600-601 (1963). (Emphasis added.)

Despite the Supreme Court's finding that Special Master Rifkin's determination of irrigable acreage was reasonable, the United States now seeks to introduce new evidence to show that there are more practicably irrigable acres within the area already considered by Special Master Rifkin. Such new evidence does not create a new cause of action but merely requests a redetermination of what has already been litigated.

A final cause of action test which has been applied by courts is whether the primary right and duty and the delict or wrong are the same in each action or whether the same right has been infringed by the same wrong. See *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316 (1927); *see also Seaboard Coastline Railroad Co. v. Gulf Oil Corp.*, 409 F.2d 879 (5th Cir. 1969). The primary right is the right of the Tribes to divert water from the Colorado River for use on a reservation. The delict in each case is the diversion of water in

derogation of that right. Certainly no new right or wrong is involved here. The United States and the tribes merely desire a larger slice of the pie.

Splitting a cause of action to allow for the litigation now, of a claim based solely on evidence which should have been raised in the previous action, is contrary to the application of any of these three tests. The mere ability to show additional evidence to support an additional ground for relief is not enough to show any additional cause of action. *Behrens v. Skelly*, 173 F.2d 715 (3rd Cir. 1948). The United States and the Tribes should not be allowed to divide this cause of action for the purpose of relitigating portions of reservation land solely on the grounds that a new and greater recovery can be proved. *See United States v. California and Oregon Land Co.*, 192 U.S. 355 (1904); *Hatchitt v. United States*, 158 F.2d 1237 (8th Cir. 1974).

5. *Application of Preclusion Doctrines in Indian Water Rights Litigation*

An instructive case for this matter is *United States v. Truckee-Carson Irrigation District, supra*, in which the Honorable Elbert Tuttle participated as one of the three judges. That case, in a large degree, parallels this litigation. The court at the outset of its decision stated:

> The question raised in this appeal is whether an equitable water adjudication filed by the government in 1913 and finalized in 1944 precludes this cause of action. *Id.*, 649 F.2d at 1289.

The court at page 1302 of the decision stated:

> The purpose of the proceeding was to obtain a decree upon which all parties could rely. *This purpose would have been defeated if the government's action did not include important claims that could upset the decreed rights of the parties.* (Emphasis added.)

(Later in this brief, where the transcript of the previous trial is discussed in detail, it will be shown that the United States intended its evidence to be a comprehensive presentation and adjudication of the Indian rights involved.)

In the Truckee-Carson decision the Ninth Circuit outlined the history of that litigation. In 1913 the United States filed, in the United States District Court in Nevada, an equitable action which included a claim upon behalf of the Pyramid Lake Indian Reservation for federally reserved water rights. The Court stated:

> The government did not assert a claim for water to sustain the Pyramid Lake Fishery. *Id.*, 649 F.2d at 1289.

After a 1944 decree, the United States in 1973 instituted the action, that the Ninth Circuit was deciding, on behalf of the Pyramid Lake Paiute Tribe seeking reserved water rights to fulfill the purposes of the Pyramid Lake Reservation, including the maintenance of water levels in Pyramid Lake for fishery purposes. In 1974 the tribe intervened as a party and the Court stated:

> The complaint purported not to 'dispute the rights decreed' in the Orr Ditch action but only to secure 'additional rights' for the United States and the Tribe, with priority dates superior to those of the defendants. *Id.*, 649 F.2d at 1295.

The Court then pointed out that many of the defendants raised as affirmative defenses the preclusive effect of the Orr Ditch Decree and that the plaintiff sought to avoid preclusion on equitable grounds as well as the impermissible conflict of interest of the United States government. Thus, the Truckee-Carson decision parallels the situation before this Court almost exactly.

The District Court handled proceedings differently than Special Master Tuttle did in that it bifurcated the trial to consider the res judicata issue separately from all other issues. After trial concerning the issue of res judicata the

District Court held that the Orr Ditch Decree was res judicata and dismissed the complaint in its entirety. This action the Ninth Circuit upheld as to all defendants except the Truckee-Carson Irrigation District, because it was a non-party being represented by the United States at the same time the United States was representing the non-party Indians.

The tribe in the Truckee-Carson case submitted three arguments as to why the preclusive doctrine should not prevent their claim. They claimed first that different evidence would be required to sustain a fishery water right than an irrigations right. Secondly, the tribe suggested that the government intended to assert only a cause of action for irrigation water, not for all reservation purposes. Thirdly, it claimed that in equitable water adjudications only claims actually litigated merge into the final decree. The Court rejected all three assertions.

As to the first assertion, the Court found that the basis for either kind of a reserved right would be the same:

> [T]he executive actions by which the Reservation was established, and the intent that motivated those actions. *Id.*, 649 F.2d at 1301.

The Court pointed out the water rights are appurtenant to the same reservation and relate to the same source of water. The only different evidence would be a determination of quantity which in itself was insufficient to distinguish the cause of action. The Court discussed the fact that the United States might have sought a decree leaving open the possibility of expanding the tribes water rights, as in *Conrad Investment Co. v. United States*, 161 F. 829 (9th Cir. 1908). Instead it chose a comprehensive adjudication (discussions elsewhere in this brief show the United States chose the same comprehensive adjudication in this matter).

Likewise, the Court rejected the argument by the tribe that in an equitable proceeding only the issues actually litigated are barred by preclusive doctrines. *Id.*, 649 F.2d at 1302.

The Court also found significant the fact that Congress and the Supreme Court have recognized that finality in water adjudications cannot be obtained when reserved rights remain unsettled, citing 43 U.S.C. § 666 (McCarran Amendment), passed by Congress in 1951, also citing decisions of this Court in *United States v. New Mexico*, 438 U.S. 696, 98 S. Ct. 312, 57 L.Ed.2d 1052 (1978), *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 810-11, 96 S. Ct. 1236, 1242-1243, 47 L.Ed.2d 483 (1976), and other authorities. *Id.*, 649 F.2d at 1308. The Court recognized that many defendants and other persons had relied heavily on the finality of the decree. They then held that not only defendant parties but subsequent appropriators who were not parties to the Orr Ditch case but who have reasonably relied upon the finality of the Orr Ditch Decree are entitled to rely on its finality. To not allow subsequent appropriators to rely would "... make it impossible ever finally to quantify a reserved water right." *Id.*, 649 F.2d at 1308-09.

The Court after discussing the various public policy matters, including those related to the preclusive doctrines, and the high value placed on the nations duty to protect Indian resources, stated:

> Nevertheless, we hold the policies served by res judicata preponderate. *Id.*, 649 F.2d at 1308.

6. *Discussion of Prior Trial. Master's Report, Court Decision and Decree*

The question of the finality of the claims for water for the reservation lands was raised several times in different

contexts in the first hearings. For example, in the Opening Statement for the claims of the United States its attorney represented that their presentation would make reconsideration of any decision arising therefrom unnecessary:

> MR. WARNER: (The United States Attorney) . . . [I]f the decree herein does determine the full quantity of rights reserved for the Indian reservations on the basis of all presently foreseeable needs, including full development of the irrigable lands which water is claimed, . . . any additional quantity which might be required for presently unforeseeable needs would be so unlikely to involve a significant quantity that that possibility can, as a practical matter, properly be excluded from consideration. Pr. Tr. at 12468-69.

Subsequently, the attorney for the United States reiterated that they were presenting evidence for the "full quantity of rights reserved":

> THE MASTER: Mr. Warner told me that he wanted water for the ultimate, future maximum capacity, potential and other words meaning 'without limit' for the Indians . . . I thought he was going to give me evidence of the maximum capacity of the land to receive water.
>
> MR. KIECHEL: (Department of Justice Attorney) That we will, your Honor . . . Pr. Tr. at 12746.

Throughout the presentation of the United States, a continuing question of justiciability caused frequent discussion of the finality of a possible decree and who would be bound by it. Prompting this was the preception that a binding and enforceable decision was the ultimate objective of all of the parties. See. Pr. Tr. 12935-36. See generally, Pr. Tr. 12858-

951, 13007-10, 13141-43 and Pr. Tr. Vol. 26, 1-96 (special session of August 20, 1957). The consideration focused on whether all claims of water users along the Lower Basin of the Colorado River would have to be brought into the adjudication in order to reach a meaningful decree and whether the whole matter would be justicible if all of those claims were presented. Throughout this discourse was the uniform recognition that there was no question that the parties and the tribes would be bound by the resulting decree and that it could be res judicata to claims that were or could have been presented in those hearings. In that context, the following exchange occurred:

MR. WARNER: Whether that decree [resulting from the present adjudication] will also bind the individual users within the state is the question which I am presently uncertain.

THE MASTER: What good does it do if it binds Arizona, but does not bind Mr. Arizona?

MR. WARNER: What good?

THE MASTER: Yes. After all, when you have a lawsuit, it is going to be a lawsuit with the contending user, rather that the State of Arizona.

THE MASTER: My suggestion is, unless you do get the contending user bound by the decree, your decree is worthless.

MR. WARNER: I don't think it will be worthless, your Honor.

THE MASTER: Will it be *res adjudicata*?

MR. WARNER: It will at least serve the purpose, yes; *res adjudicata* as establishing what is the maximum quantity of water that may be used with respect to the reservation — (Emphasis added.) Pr. Tr. at 12935.

The Master later added his agreement that, as between the States, United States and the Tribes, a decree would be binding:

MR. WARNER: ... This is an interstate case that the United States came into to assert its rights as against all rights which are represented by the party states in that case. This is one type of right that the United States claims. It has to try that right out against those who are parties to the case.

THE MASTER: I understand. It will get a decree which is good against the State of Arizona.

...

MR. WARNER: In this case we happen to have the United States in here asserting these proprietary interests and in a sense the United States is doing it in its proprietary capacity, its fudiciary capacity, and I suppose to some extent in its sovereign capacity.

THE MASTER: I have no doubt that the Indians are here because the Congress has enacted [sp.] the Attorney General represent the Indians, so they have a lawyer in Court ... Pr. Tr. 12946-48.

Finally, Mr. Warner reiterated to Special Master Rifkin, during an exchange concerning the type of evidence the United States utilized to demonstrate "irrigable lands", that the government was asserting all of its claims at that time and would be satisfied with a decree based upon its presentation:

[During the cross-examination of Mr. Robert H. Rupkey, a witness for the United States concerning irrigation on the Colorado River Reservations]

MR. ELY: (Attorney for California) Are there lands that are irrigable but not shown as such upon your maps with respect to the Colorado River Indian Reservation?

MR. WARNER: If your Honor please, Mr. Ely might define what he conceives "irrigable" to mean.

THE MASTER: I assume he is using the witness's definition.

MR. ELY: Exactly.

MR. WARNER: The witness has defined "irrigable" as used on these maps as being those lands which could be served by the existing or proposed project.

. . .

THE MASTER: Is that your definition of "irrigable"; those that can be served by existing or those presently proposed on the map? I did not gather that, but may be that is your definition.

THE WITNESS: That was what was intended; yes.

. . .

MR. ELY: I am using "irrigable", your Honor in whatever sense Mr. Warner used it in his opening, in stating that irrigable lands constitute the only criteria for the claim for Indian water. But I am trying to find out whether we may rely upon these maps as limiting that claim or not.

. . .

THE MASTER: All right. Now you want a concession from Mr. Warner as to whether this is a Bill of Particulars?

MR. ELY: Yes.

THE MASTER: Is it, Mr. Warner?

. . .

MR. WARNER: . . . as reflected by these maps and by the other testimony will define the maximum claim which the United States is asserting in this case.

THE MASTER: No. The question is whether the maps illustrate and define the term "irrigable" as used in your claim.

MR. WARNER: . . . *I can give this assurance: that we do not propose to ask a decree allowing water in favor of the — for the use of the Indian reservations in excess of the proof that we are offering in this matter.*

THE MASTER: I understand that. The question is whether these maps constitute the definition of what you regard as irrigable. I think it is a fair question.

MR. WARNER: Well, Your Honor, that is how we are defining "irrigable" for purposes of proving the claim that is being asserted.

THE MASTER: And *although there may be other irrigable lands within those reservations, those you do not lay any claim for for the service of water upon?*

MR. WARNER: *That is correct.*

THE MASTER: *All right.* That is what we know, and *that is the way we are going to be bound. This is a statement which I will take seriously.*

MR. WARNER: All right.

THE MASTER: Because he has limited himself; and I take it now by what you say, you are limiting yourself by lands which are irrigable for works presently existing or which are shown as proposed on these maps. . . . Now, I want you to realize that you are limiting your claims to those lands as irrigable within that definition; namely, those

capable of being served by existing works or proposed works as shown on these maps.

. . .

MR. WARNER: If Your Honor should make a report recommending a decree allowing all the water that is necessary for those purposes; we will be satisfied.

THE MASTER: That is not a condition I will accept. I shall assume that the categories of lands indicated on the Indian reservation on these maps constitute your Bill of Particulars to what you regard as irrigable within the terms of the United States claim, subject to correction that you can bring to our attention if there is some clerical error, in the course of the trial, but otherwise, I shall assume that that is your Bill of Particulars.

MR. WARNER: I might say that I think —

THE MASTER: That is your intention.

MR. WARNER: — that I think is correct. Pr. Tr. 14152-57. (Emphasis added)

At page 13799 of the transcript Special Master Rifkin indicated that the occasion for the trial of the Indian claims arises out of and only out of the desire of the United States to use the present jurisdictional opportunity to establish Indian uses throughout the Basin as a precaution against future contests.

The desire of Special Master Rifkin to obtain a final and binding decree is evidenced in the transcript from the previous proceedings at 12456. There, Mr. Warner, the United States attorney, made the assertion that the Indians could come back at a subsequent time to seek a modification of any decree. The Special Master stated that if that were the type of decree adopted, it would mean that nobody else

could rationally develop or utilize the surplus water because no one would be willing to invest under such a cloud of uncertainty.

> THE MASTER: ... nobody else, to all intents and purposes, could rationally develop the utilization of the surplus water. You certainly would not want to spend a lot of money for the development.
>
> ...
>
> THE MASTER: You would not want to give an opinion of counsel to an underwriting house selling a bond issue? Pr. Tr. at 12456.

It cannot be doubted that the United States recognized its obligation in the first proceedings to prove the full Indian claims to the extent that they could. Mr. Warner so stated:

> MR. WARNER: ... I think it is our duty to prove the Indian claims to the full extent we can prove them. Pr. Tr. at 12564.

A strong indication of the intent of Special Master Rifkin to finally and fully adjudicate Indian water right claims is contained in the discussion and the transcript at pages 12646 through 12648. There Master Rifkin indicated that if an open decree were to be adopted concerning the Indian water right claims he would receive and consider only evidence of present Indian uses because in the future Indians could present additional evidence if the need arose. However, Special Master Rifkin did not limit the evidence to present Indian uses but received evidence from the United States of all practicable irrigable acreage on the reservations which the United States felt it could prove.

RIFKIN REPORT OF 1960

The December, 1960, report of Master Rifkin reiterated his concern for finality, where he wrote:

> [T]he claims of the United States to water from the Colorado River for the benefit of Indian reservations are of such great magnitude that failure to adjudicate them would leave a cloud on the legal availability of substantial amounts of mainstream water for use by non-Indian projects ... [F]ailure to adjudicate it will leave non-Indian users in doubt as to the water available for their use, and since this controversy has been properly presented in this case, it is appropriate to adjudicate it here. Special Master Report, at 256 and 257 (December 5, 1960).

The report continues with the discussion of various types of decrees which could have been adopted to resolve the need to deal with uncertainty in future needs and the need for finality:

> One possibility would be to adopt an open-end decree, ... However, such a limitless claim would place all junior water rights in jeopardy of the uncertain and unknowable. Financing of irrigation projects would be severely hampered if investors were faced with the possibility that expanding needs of an Indian reservation might result in a reduction of the project's water supply.
>
> ...
>
> The other possibility, which would avoid the serious disadvantage of creating uncertainty as to the extent of the reserved rights, would be to predict the ultimate needs of each Reservation and decree that much water for its future use. Id., at 263-264.

After weighing the various possibilities and interests, Special Master Rifkin concluded:

> Therefore, the most feasible decree that could be adopted in this case, ... would be to establish a water right for each of the five reservations in the amount of water necessary to irrigate all of the practicably irrigable acreage on the Reservation ... *This will preserve the full extent of the water rights created by the*

> *United States* and will establish water rights of fixed magnitude and priority as to provide certainty for both the United States and non-Indian users. Id. at 265. (Emphasis added.)

Special Master Rifkin clearly intended for the decree to be final - "of fixed magnitude." This quantity in turn was set as an amount sufficient for the "practicably irrigable" acreage, as he interpreted that term from the presentation of the United States' evidence. In other words, all lands that would be irrigated from then existing or proposed irrigation works. *See*, Pr. Tr. 14155-56.

THE SUPREME COURT OPINION

This Court made apparent its agreement with Special Master Rifkin's desire to finally determine all water rights for undisputed reservation lands in its 1963 opinion. Moreover, it expressly upheld Master Rifkin's finding of irrigable acreage:

> We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservation and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the Reservation ... We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the Reservation can be measured is irrigable acreage. *The various acreages of irrigable land which the Master found to be on the different reservations we find to be reasonable.* 373 U.S. at 600-601. (Emphasis added.)

It does not logically seem open to dispute that both Special Master Rifkin and this Court intended for the decree to be binding as to the United States and their Indian wards with respect to Indian water rights adjudicated in the prior proceedings. This Court should now so order.

DETRIMENTAL RELIANCE

EXCEPTION:

Arizona excepts to the Master's finding that its reliance on the 1964 Decree of this Court "... might not be sufficient to foreclose the present claims."

PROPOSED FINDING:

Arizona has relied extensively on the amounts of water decreed to Indian Tribes in 1964 and to now increase the decreed amounts will seriously and detrimentally impact on the State of Arizona and its plans to use Colorado River water in Central Arizona by means of deliveries through the Central Arizona Project. This detrimental reliance and the impact resulting to the State now precludes a reopening of the 1964 decree to award additional amounts of water to the five Tribes.

PROPOSED ACTION:

That this Court enter its decision and order denying any increase of water rights over the 1964 decreed amounts for the four reservations which have lands located within the State of Arizona for so-called "omitted lands" and ordering that the 1964 decree is binding upon the parties as to amounts of water decreed for Indian use on all lands located within the boundaries of the reservations as of the time of the 1964 decree.

ARGUMENT

Having initiated this action to judicially ascertain its Colorado River entitlement, the 1963 decision and 1964 Decree of this Court have served as a benchmark upon which all planning has been based, and upon which reliance has been centered for the past 18 years in Arizona. The report of Master Tuttle, at page 38, states: "... Arizona appears to present the most compelling case of detrimental reliance." Indeed Arizona feels its case requires the "omitted land" claims to be denied.

Detrimental reliance is an important feature of preclusion doctrines discussed in the briefs of State Parties. In a context almost identical to this current proceeding, the Ninth Circuit decided *United States v. Truckee-Carson Irrigation District*, 649 F.2d 1286 (1981). The Court in that action stated:

> This action was filed by the government on December 21, 1973. The complaint purported not to *"dispute the rights decreed"* in the Orr Ditch action but only to secure *"additional rights"* for the United States and the Tribe, with priority dates superior to those of the defendants. *Id.*, 649 F.2d at 1295. (Emphasis supplied.)

(That is precisely what the United States and the Indian Tribes are attempting to do in this action.) One of the defenses raised as an affirmative defense was the preclusive effect of the Orr Ditch Decree. The Court stated:

> The plaintiffs sought to avoid preclusion on equitable grounds and on the ground that in the Orr Ditch case the government plaintiff had an impermissible conflict of interest. *Id.*, 649 F.2d at 1295.

The Ninth Circuit indicated its concern with protecting those who had relied on the prior litigation.

> We must also protect adverse parties who have reasonably relied on the government's authority in the ligitation. *Id.*, 649 F.2d at 1301.

The Court also said:

> There is no question that the Orr Ditch defendants and many others have relied heavily on the finality of the decree. *Id.*, 649 F.2d at 1308.

The Court even went so far as to hold:

> . . . the subsequent appropriators who were not parties to Orr Ditch but who have reasonably relied on the finality of the Orr Ditch Decree are entitled to rely on its finality. *Id.*, 649 F.2d at 1308.

With these principles in mind, Arizona proceeds to a discussion of its reliance on this Court's Decree in 1964. The chief witness in presenting this case was Mr. Wesley E. Steiner, currently serving as the Director of the Department of Water Resources of the State of Arizona. His testimony on direct was presented beginning on page 2681 of the transcript and ending on page 2754.

Mr. Steiner graduated from the University of California at Berkeley in 1950 with a Bachelor of Science Degree in civil engineering. He then worked for the State of California until February of 1969 in the Division of Water Resources. At that time he came to the State of Arizona, as the State Water Engineer and Executive Director of the Arizona Water Commission and now serves as Director of the Department of Water Resources for the State of Arizona. He has 30 years plus in water resources work, 25 years of that service having been largely devoted to the Colorado River.

As early as 1922 plans began to develop for constructing a project to bring water from the Colorado River to the dry central portions of the State of Arizona. The name given to this planned project was the Central Arizona Project. The Central Arizona Project is a system of pumping plants and aqueducts to bring Colorado River water from Lake Havasu to the metropolitan areas of Phoenix and Tucson, and also to agricultural users of water in primarily three counties of the State of Arizona. Those counties are Maricopa, Pima and Pinal. It also delivers water for use by twelve Indian tribes in central Arizona.

Early congressional efforts to obtain legislation to bring water from the Colorado River failed because of opposition by the State of California. (Tr. 2686). The opposition from California was based on the fact that Arizona did not have the necessary water rights to support the project and Congress directed Arizona to confirm its water rights in court

(TR. 2687). It was this effort to judicially affirm its water rights which resulted in the 1963 decision and 1964 decree. Renewed efforts before the Congress soon followed the decree (TR. 2689).

The decreed amounts of water to the five tribes who now seek additional water was of utmost importance in planning and presenting testimony before the Congress to obtain enactment of legislation which would authorize construction of the Central Arizona Project. All decreed amounts had to be deducted from Arizona's entitlement, therefore, in order to determine how much water would be available for delivery by the Central Arizona Project. Therefore, reliance upon the amounts of water decreed to the five tribes in this litigation was imperative.

Not only Arizona witnesses, but federal witnesses, relied upon the decreed amounts (including the Indian decreed amounts) in presenting their testimony to the various congressional committees considering authorizing legislation for construction of the Central Arizona Project. Congress and interested users in Arizona had to know how much water would be delivered so that they could determine the economic feasibility of the project. Having been convinced that Arizona had confirmed its water rights in the 1964 Decree of this Court and in reliance upon the testimony of witnesses that certain amounts of water could be delivered through the Central Arizona Project, and in reliance upon the fact that that amount of water would afford a positive cost benefit ratio for the project, Congress enacted authorizing legislation in 1968 and the President signed the law September 30, 1968 (TR. 2693). Colorado River Basin Act. Pub.L.No. 90-537.

Arizona, having relied upon the 1964 Decree before Congress, and having received favorable action by Congress, immediately proceeded to implement this legislation. Efforts in conjunction with the federal government began in earnest. One of the early requirements of the United States before construction could be implemented was that Arizona

establish an entity with taxing power to contract with the Secretary of Interior for the delivery of the water through the Central Arizona Project so that assurance of repayment of the reimbursable features of the Project could be given. The Arizona Legislature acted promptly to grant legislative authority, and in 1971 legislation authorizing the formation of a multi-county water conservation district was passed. This law is contained in Chapter 13, Title 45, of the Arizona Revised Statutes. Section 45-2603 Arizona Revised Statutes, authorized the imposition of an ad valorem tax.

Shortly thereafter a three-county conservation district was established covering the three counties of Maricopa, Pinal and Pima. At the time Mr. Steiner testified the district had levied and collected ad valorem taxes for the past six years from the residents of those three counties, and taxes had been paid in the amount of approximately nine and one-half million dollars (TR. 2695). Following enactment of the statute that permitted establishment of the multi-county repayment district, construction of the Central Arizona Project was undertaken by the federal government. To date 932 million dollars has been appropriated by the Congress for construction of the Project based on reliance on the 1964 decree.

Because Arizona is located in such a water short area of this nation, as its population and its economy grew the amount of groundwater pumped from beneath the surface far exceeded the amount of natural recharge. Water to be transported to Central Arizona by the Central Arizona Project would in part alleviate the two and a half million acre feet of annual groundwater mining which is occurring in the State of Arizona. In order to further attempt to alleviate that situation, the Act authorizing the Central Arizona Project required that only those lands with a recent

history of irrigation (5 years) receive water from the Project (TR. 2619). Arizona relied, in agreeing to this requirement, on using Colorado River water to alleviate groundwater overdrafting.

The Secretary of the Interior in order to further control the amount of groundwater pumping requested that Arizona have its legislature enact a comprehensive and restrictive groundwater management act. Arizona in reliance upon receiving the remainder of the water which was judicially determined to be Arizona's portion by this Court enacted such legislation. Arizona Revised Statutes 45-401 et. seq. The program set forth in this Management Act is predicated upon the receipt of planned for and relied upon amounts of water through the Central Arizona Project. It won't function as envisioned without those supplies. The Management Act created active management areas in four parts of the State of Arizona where groundwater usage is greatest. Relying upon the receipt of the full remaining entitlement of Arizona's share of Colorado River water through the Central Arizona Project the legislature required reduction in groundwater pumping so as to achieve safe yield in the three urban active management areas by the year 2025. Safe yield means there will be a balance between consumption of water and water supply so that mining of groundwater will no longer occur (TR. 2722 through 2723). If the new amounts of water recommended by Special Master Tuttle are given to the Indian reservations in question, Arizona's reliance in enacting its groundwater management act will have been in vain, and to the extent that the relied upon water is not received the purposes of the Groundwater Management Act will be thwarted.

The State of Arizona was acutely concerned with the manner in which the Secretary would allocate the Central Arizona Project water within the State. Concern centered around what allocations would be made to municipal and industrial uses, what allocations would be made for agricultural uses, what priorities, if any, would be given to each of

the users within those categories, and of course what amounts would be given to individual applicants for the use of the water. The Secretary of the Interior requested that Arizona recommend allocations of Central Arizona Project within the State of Arizona (TR. 2708 through 2710). Relying upon the 1964 decreed amounts, Arizona determined the amount of water which it could expect to receive through the Central Arizona Project and developed its allocation recommendations on how those resources should be allocated among applicants for over five times the available supply. Interested parties appeared at various public hearings held throughout the State and presented their views concerning the recommended allocations. Studies by the Arizona Water Commission staff resulting in staff recommended distributions, and the testimony of witnesses at public hearings relied upon the 1964 decreed amounts. Thereafter, Arizona did recommend to the Secretary of the Interior how it wished the water to be allocated.

Arizona not only relied upon the decreed amounts for the above indicated purposes but also relied upon those amounts in its efforts with the Secretary of Interior to determine what amounts the Secretary would require to be delivered through the Central Arizona Project to twelve Indian tribes in the central portions of Arizona. Whatever amount of water would be delivered to those twelve tribes would be deducted from Arizona's remaining entitlement and impact on deliveries to non-Indian users. Arizona fully relied upon the 1964 decree in order to present its views to the Secretary respecting the amounts to be delivered to the twelve tribes in Central Arizona. By Secretarial order, the Secretary allocated a total of 309,810 acre feet annually through the Central Arizona Project to the Indian tribes in the central portions of this State (TR. 2014). Not only Arizona but the United States and the twelve tribes of Central Arizona found themselves relying upon the amount of Arizona's remaining entitlement for purposes of these negotiations. If the decree is now upset and additional water is awarded to the five tribes seeking additional water in

this litigation, the entire basis for negotiations relative to amounts to be delivered to particular central Arizona tribes is without foundation.

The additional amounts of water recommended by Special Master Tuttle to be decreed to the five Indian tribes along the Colorado River will significantly impact the supply of water available to the Central Arizona Project. As development occurs in the Upper Colorado River Basin, pursuant to provisions of the Colorado River Compact, the Upper Basin will put to use more of its entitlement, and the supply available to the Lower Basin will decrease and the severity of water shortages for Central Arizona Project water users in drought years will increase. The water to be delivered through the Central Arizona Project has the lowest priority among Colorado River water users in the State. Therefore, as shortages occur they will first impact on the Central Arizona Project.

Arizona's water experts have determined that the firm supply of water to be delivered through the Central Arizona Project in the later years of the project repayment period will be 550,000 acre feet per annum. Most of the 309,810 acre feet allocated to Central Arizona Indian tribes enjoys a priority equal to non-Indian municipal and industrial uses, although it will be used by Central Arizona Indian tribes for agricultural purposes. All water decreed to the five tribes now seeking additional water rights will impact immediately upon non-Indian agricultural users of Central Arizona Project water and at such times as deliveries fall below 949,810 acre feet there will be a direct impact upon the twelve Indian tribes and non-Indian municipal and industrial users within the central portions of the State.

Arizona also affirmatively presented evidence that the five tribes in question are in a rather favorable position when compared to other Indian and non-Indian users in the state. State Party Exhibits 31 through 38, presented during the testimony of Mr. Steiner, illustrate this enviable position. For instance, Exhibits 31 and 32 compare the present

dependable supply of these five reservations to the current actual supplies and recommended allocations of Colorado River supplies to other users. This comparison shows that the Colorado River Tribe has a present dependable supply of 350 acre feet per capita per annum, while the rest of the State has 1.34 acre feet per capita per annum. Similar figures for Fort Mohave are 298 acre feet per capita per annum, Cocopah 5.90 acre feet per capita per annum. The other tribe in this litigation seeking water rights which would impact against Arizona's entitlement is Fort Yuma. No figures were presented with respect to that reservation in that it had no lands located within the State of Arizona until a boundary claim came into existence by Secretarial Order in 1978. It had no decreed rights in the 1964 decree for lands located in the State of Arizona.

Arizona submits that it has placed great reliance upon the efforts of Special Master Rifkin and this Court. To upset those efforts now would severely act to the detriment of Arizona. Arizona feels the following language from *United States v. Truckee-Carson, supra*, is equally applicable to the current proceedings:

> There was adversity between the plaintiff and the defendant, all concerned perceived that adversity, and it could justly be supposed that the parties would assert all their claims and defenses. The resulting decree was drafted in broad terms, and the Orr Ditch parties were barred from relitigating in any way the claims determined. *Id.*, 649 F.2d at 1309.

Arizona finds no discernable difference between the inquiry concerning "detrimental reliance" and that of "detrimental impact" as the Master intimates at page 38 of his report. He states that detrimental impact cannot be seriously denied. Then he seems to indicate that there is a difference between detrimental reliance and that of detrimental impact. If there was no impact from the reliance there could be no detriment. Therefore, not "impact" or "reliance" but "detriment" is of primary concern. Arizona

has vividly demonstrated this detriment and affirmatively asserts that this Court should compel all parties to be bound by the 1964 Decree in this matter.

MODERATE LIVING

EXCEPTION:

Arizona excepts to the Master's refusal to allow presentation of evidence of what would constitute a "moderate living" for the five Tribes, and to reopen the 1964 decree in its entirety to apply more recent judicial refinements of the reserved rights doctrine and examine the "practicably irrigable" standard of establishing Indian water rights.

PROPOSED FINDING:

Pursuant to the case of *State of Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658 (1979), evidence relating to what constitutes a "moderate living" is admissible to ascertain the reasonable livelihood needs of the Indians and thus ascertain the minimum allocation of Colorado River water the Indians could receive and maintain a "moderate living."

PROPOSED ACTION:

If the Court concludes the 1964 decree is not binding on the parties then in a reopening of that decree all relevant issues should be examined and the Court should remand in total for a redetermination of the Indian 1964 decreed rights.

ARGUMENT

During the proceedings before Special Master Tuttle, and before the taking of any evidence, this Court decided the *State of Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979). Pursuant to that case the State Parties filed a motion with Special Master Tuttle requesting that they be allowed to litigate the question of how much water would be needed to provide Indians with a "moderate living." This motion was filed in September, 1980.

After the decision was handed down by this Court, the State Parties began to undertake discovery related to such issues as, (1) the number of Indians residing on each of the five reservations, (2) the number of acres of land farmed by the tribes or by individual Indians, (3) the number of acres leased to others to farm, (4) the amount of money received for leasing lands to others to farm, and (5) other related issued pertaining to the tribes or individual Indian income. With the evidence to be obtained from this discovery the State Parties intended to present to the Special Master evidence showing the income produced on each reservation and per capita income on each reservation. It was the intent of the State Parties to follow such evidence with evidence pertaining to the requirements for a moderate living by showing national figures pertaining to a family of four, state figures pertaining to a family of four, or such other size families on which figures existed. It was also the intent of the State Parties to prove the cost of living in the areas of the reservations in the State of Arizona, State of Nevada and State of California.

In attempts to obtain such evidence the State Parties had indeed conversed with both the United States and Representatives of various of the tribes to arrange dates to visit the reservations to obtain Tribal and Bureau of Indian Affairs information to compile proof of the kind described. As these efforts were progressing a pretrial hearing was held in Atlanta, Georgia by Special Master Tuttle on July 10, 1980. At that pretrial hearing the motion to allow the States to present evidence concerning what constituted a "moderate living" was presented and Special Master Tuttle ruled that he would not hear such evidence and that he would not consider this issue. The State Parties requested and were allowed the opportunity to file with Special Master Tuttle a memorandum in the nature of an offer of proof, which memorandum was prepared from information then available to the State Parties. (Appendix A.) However, following this ruling the tribes refused to allow the State Parties to come to the reservations and obtain information

of the nature that was being sought. Consequently, the offer of proof was not as detailed or thorough as the State Parties would have hoped to make it. Nevertheless, it is requested that this Court consider that offer of proof as though set forth fully herein.

A lengthy discussion of the *Washington Commercial Fishing Vessel Association* case is probably not needed. The holding of that case would seem, without question, to apply to these proceedings. This Court cited *Arizona v. California*, 373 U.S. 564 (1963), and *Winters v. United States*, 207 U.S. 564 (1908), as support for the proposition that in cases involving scarce natural resources, and after a determination that the resource involved was necessary for the Indian Welfare, "... the court typically ordered a *trial judge or special master* in his discretion, to devise some apportionment that assured that the Indians *reasonable livelihood needs* would be met." *Washington v. Fishing Vessel Ass'n., supra*, 443 U.S. at 685. (Emphasis supplied.)

No reasonable argument can be made that water is not one of the most precious, and at the same time one of the most scarce natural resources of the area of the southwest served by the Colorado River. With this in mind the principles and teachings of the *Washington State Commercial Fishing Vessels Association* case are of utmost importance in the determination of so-called "Winters Rights" or "Reserved Rights" for Indians. No longer can any one group of people insist upon the right to use water in this area without consideration of the needs and rights of others. Therefore, as this Court instructed it was appropriate that the Special Master hear evidence about and decide the issue of the requirements of Indians to provide them with a moderate livelihood.

As this Court so succinctly stated: "This is precisely what the District Court did here, except that it realized that some *ceiling* should be placed on the Indians apportionment to prevent their needs from exhausting the entire resource and thereby frustrating the treaty rights of 'all other citizens of the territory.' " *Id.*, 443 U.S. at 686.

Recognizing that the treaty imposed a 50% ceiling on the Indian fishing rights, the Court, nevertheless, recognized that the ceiling imposed a maximum but not a minimum allocation. Referring to the decision in this litigation this Court stated:

> As in Arizona v. California and its predecessor cases, the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but not more than, is necessary to provide the Indians with a livelihood — that is to say, a moderate living. *Id.*, 443 U.S. at 686. (Emphasis supplied.)

The ruling by Special Master Tuttle abruptly halted all discovery pertaining to the issue of a "moderate living" for the Indians. It is submitted that that ruling was in error and that these proceedings should have included the presentation of such evidence as is relevant to the establishment of what amount of water is required to provide the Indians with "... so much as, but not more than, ..." the amount of a very scarce natural resource as is necessary for a "moderate living." Having precluded this issue from being presented Special Master Tuttle ignored this court's ruling and erred to the prejudice of the State Parties.

Arizona urges the reopening of the 1964 decree entirely if it is not binding as to all parties. The bases for such a request are several. In addition to *State of Washington v. Washington State Commercial Passenger Fishing Vessel Association, supra,* this Court also decided *United States v. New Mexico,* 438 U.S. 96 (1978), since the 1964 decree. These subsequent refinements of the reserved rights doc-

trine justify a reopening, if indeed the decree can be reopened as claimed by the United States and the Tribes, to examine several aspects of the prior case. Among those are the following:

(1) The purpose and scope of the reservations should be read narrowly, focusing on the principal and secondary purposes of the reservations.

(2) The leasing of lands and water rights to non-Indians for development on the reservation beyond the "reasonable needs" of the Tribe itself is not a "primary" purpose of the reservation.

(3) The proper measure of the "reasonable needs" of a Tribe is not the *maximum* amount of irrigable acreage on the reservation, but is the *minimum* amount necessary to provide the Tribe a "reasonable livelihood".

(4) The determination of the water rights for the Colorado River Indian Reservation, the largest of the five mainstream reservations, must take into account that it was set aside for a number of tribes who refused to settle there and were later relocated to several of the other mainstream reservations, so that the determination of the measure of the rights of the five reservations involved a significant "double dip" into the available water supply based on double acreage for tribes who never settled on the Colorado River Indian Reservation.

(5) A comprehensive evidentiary hearing should be undertaken on whether the "practicably irrigable acreage" standard was indeed a proper measure to apply especially in the State of Arizona. For instance in Arizona water is so scarce that the application of this standard on all Indian reservations in this state

would satisfy only one-third of the Indian demands, and none of the demands for non-Indians. From a purely practical point of view, is this standard workable?

If Article IX is to be read so broadly as to allow modifications of the nature sought by the Indians and the United States, then it likewise permits reopening to pursue the matters raised in this section of this brief.

TECHNOLOGICAL CHANGES

EXCEPTION:

Arizona excepts to the Master's refusal to apply technology as of the time the reservations were created for purposes of determining what water rights were impliedly reserved for the tribes.

PROPOSED FINDING:

For the purpose of ascertaining the implied intent as to how much water is reserved for use on an Indian reservation, the technology at the time the reservation is created is to be applied.

PROPOSED ACTION:

If the Court determines the parties are not bound by the 1964 decree as to lands within the reservations at the time of the decree then the matter should be remanded to receive evidence as to what irrigation and related technology existed at the time of the creation of each reservation to determine what amount of water was impliedly reserved when the reservation was created.

ARGUMENT

The so-called "Winters Doctrine" or "Reserved Rights Doctrine" is based upon the concept that where an Indian reservation is created and nothing is said in the documentation creating that reservation pertaining to water rights, nevertheless, it must have been implied by the legislative or executive authority that water rights would be reserved for the tribal lands. See *Winters v. United States, supra.* Thus, the court established that such an approach would be nec-

essary in order to make the land useful. The court by implication provided the required intent in place of silence on that issue. The question to be determined at this time is whether or not the court will further provide, in place of silence, an intent that Congress, the President, or such other executive who establishes an Indian reservation also by implication intended that water rights pertaining thereto should increase with technological advances. This issue becomes of importance in view of the fact that large acreages of the Indian reservations in question are found by Special Master Tuttle to be practicably irrigable on the basis that the new techniques of "drip irrigation" and "sprinkler irrigation" allow for profitable irrigation of lands that could not be irrigable under prior technology.

Claims in this case were that the rate of application of water could be so controlled as to allow the irrigation of sandy soils frequently enough to avoid the moisture content becoming so low as to be critical to plant life. It was further claimed that lands that could not be irrigated before because of excessive contour or slope problems can now be irrigated by side roll or center pivot sprinklers or drip irrigation.

The key question in this issue is whether or not the judiciary can, or should attempt to ascribe to the minds of legislators or executive officials who are acting in the late 1800's wisdom and foresight to know that irrigation technology existing 100 years later would alter irrigation techniques so as to allow the irrigation of lands which were not considered irrigable at the time the reservations were created. No doubt reasonable minds could conclude that technological advances would occur. However, gross speculation is necessary to ascribe to the minds of the late 1800's the vision to know what would occur in the 1970's and early 1980's.

A more reasonable approach, the State Parties submit, would be to conclude that those persons establishing a home for Indians considered and decided what amount of lands would be appropriate to set aside for their use. If later events proved them to be erroneous then additional lands could be added to that reservation by others who were familiar with the conditions existing at that later time. Those lands then could receive a reserved right as of that time. It would be stretching implication far beyond reason to conclude that any increased Indian needs be met by technological changes. No one could know or even reasonably foresee what technological changes would occur in the future. However, it is well within reason to conclude that if Indian needs increased additional lands could be set aside and appropriate water rights reserved to meet those needs.

Special Master Tuttle received from the State Parties a memorandum in the nature of an offer of proof on this issue. (See appendix B)

With respect to the reservations in question there are later additions of land to some of the reservations. Those additions to the reservations have sought, and received, a recommendation of Special Master Tuttle for water. (The question of title to these lands is addressed by the Metropolitan Water District brief and the State Parties joint brief.) This method of meeting any increase in Indian need allows the decision maker to have the ability to obtain all known facts and act upon those facts. This method is much superior to the approach which would at best be a guesstimate of what was in the mind of the decision maker as to technological advances at some unknown time in the future.

It must also be pointed out that an approach which allows an increase in water rights based on technological advances would forever prevent the certainty that was sought by both Special Master Rifkin and this Court as to all water rights considered in the prior trial so as to allow all users thereafter to know what rights they had and allow them to finance irrigation systems and municipal systems

for the use of that water. If Indian water rights can be increased each time a technological advance occurs such finality will never occur.

CONCLUSION

This Court should preclude a relitigation of so-called "omitted lands" and order the 1963 decision and 1964 decree binding on the Parties. If the Court concludes the decree to be completely open-ended then the issues presented by Arizona and the State Parties should be tried in any reopening. Boundary questions must be finalized in an appropriate proceeding before additional water rights are assigned to "boundary lands" and this Court should enter appropriate orders relating to the boundary questions.

STATE OF ARIZONA

By _____

RALPH E. HUNSAKER
Special Attorney for the
Department of Water Resources

AFFIDAVIT OF SERVICE

RALPH E. HUNSAKER, being first duly sworn, deposes and says:

That he has made service of the foregoing brief by causing to be mailed the original and fifty-nine copies to:

Clerk
Supreme Court of the United States
Washington, D.C. 20543

and has caused to be mailed three copies of said brief to each of the following:

For the United States:
MESSRS. SCOTT B. MCELROY and MYLES E. FLINT, Assistant Attorneys General, United States Department of Justice, Washington, D.C. 20530.

For the Metropolitan Water District of Southern California:
MR. CARL BORONKAY, 1111 Sunset Boulevard, Los Angeles, California 90054.

For the State of California:
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MR. RAYMOND C. SIMPSON, 2032 Via Visalia, Palos Verdes Estates, California, 90274, and MR. ROBERT J. KILPATRICK, Kilpatrick, Clayton, Meyer & Madden, 200 Pine Avenue, Suite 606, Long Beach, California 90801.

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For the Cocopah and Chemehuevi Indian Tribes:
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For the State of Nevada:
ATTORNEY GENERAL RICHARD BRYAN by MR. JAMES V. LAVELLE, Deputy Attorney General, 4220 Maryland Parkway, Las Vegas, Nevada 89019.

DATED at Phoenix, Arizona, this _____ day of May, 1982.

_____
RALPH E. HUNSAKER

SUBSCRIBED AND SWORN to before me this _____ day of May, 1982.

_____
Notary Public

My Commission Expires:

_____

SUPREME COURT OF THE UNITED STATES
BEFORE THE SPECIAL MASTER

OCTOBER TERM, 1979
NO. 8, ORIGINAL

STATE OF ARIZONA,
COMPLAINANT

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, AND COUNTY OF SAN DIEGO,
DEFENDANTS,

UNITED STATES OF AMERICA and STATE OF NEVADA,
INTERVENERS,

STATE OF NEW MEXICO and STATE OF UTAH,
IMPLEADED DEFENDANTS.

STATE PARTIES OFFER OF PROOF RE REASONABLE LIVELIHOOD "MODERATE LIVING"

APPENDIX A

OFFER OF PROOF RE REASONABLE LIVELIHOOD "MODERATE LIVING"

On July 2, 1979, the United States Supreme Court decided the case of *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 61 L.Ed. 2d 823 (1979). This case cited among other cases *Arizona v. California*, 373 U.S. 546, 10 L.Ed. 2d 542 (1963). In the *Washington* fishing case, the United States Supreme Court indicated as follows:

> As in *Arizona v. California* and its predecessor cases, the central principal here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but not more than, is necessary to provide the Indians with a livelihood - that is to say, a moderate living. 443 U.S. at 61 L.Ed. 2d at 846.

The United States and the Indians in this case claim as authority for reopening the 1964 Decree, Article IX and Article II(d)(5). If these articles are legally valid as a basis for reopening of the decree, it is required that the Master look into all aspects of the claims for additional water, including that of what amount of water is necessary to provide the Indians with a "moderate living."

The Master has ruled as of July 10, 1980, that this issue will not be allowed. This ruling has resulted in the United States and the Indians failing to answer interrogatories and requests for production, and terminating agreements that the State parties could come to the reservations and review leases and other documentation relative to Indian income. Agreements that the State parties could come to the reservation had been arrived at and negotiations were occurring at the time of the Master's ruling to arrange times and places for the State parties to go to the reservations and review the necessary documentation and evidence.

With respect to the Indian reservations in question, it would be the proof of the State parties that in the previous litigation the reservation populations were stated and the Special Master would be requested to take judicial notice thereof. On the Fort Mohave Reservation, the population of the Tribe was approximately 450. On the Chemehuevi Reservation the population was approximately 300. On the Colorado River Reservation the population was approximately 1300. On the Fort Yuma Reservation the population was approximately 1200 and the Cocopah Reservation population was approximately 90.

The States, if allowed to do so, would also present evidence that the Arizona statistical review prepared by the Valley National Bank for 1979 shows the population of the Cocopah Reservation is 465. The Colorado River Reservation population is 2,019 and Fort Mohave is 412. The statistical review shows no population on the portion of the Fort Yuma Indian Reservation that is in Arizona, because until the December 20, 1978, Secretarial Order and Solicitor Opinion, none of the lands for which water is now sought in Arizona were considered as Indian lands.

The States would further present proof through the Tribal Chairman or other witnesses from the Tribes and the Bureau of Indian Affairs and through answers to interrogatories or request for production and documentation which would be received from the various Tribes regarding leases of Indian land to non-Indian farmers. The States would also show the amount of income to Indians through farming of land by either tribal farms or individual Indian farmers on the reservation, or through leases to non-Indian farmers.

In the case of the Fort Yuma Indian Reservation, the gentleman who toured with the various witnesses on behalf of the State and lawyers on behalf of the States when the Fort Yuma Indian Reservation was visited, a Mr. _____, indicated that the lands being leased on the Fort Yuma Indian Reservations to non-Indian farmers were being

leased for $200 an acre. Based upon a lease of $200 an acre and with decreed water rights in 1964 of 7,743 acres, annual receipts of $1,548,600 would be received by the Tribe. An annual income of $12,905 for every man, woman and child on the reservation would be received, and for a family of four that would mean an annual income of $51,620.

Using the decreed water right figures for the other reservations together with the populations used at the previous trial, and assuming a $200 an acre rental incomes for the other reservations, annual incomes for every man, woman and child for the other reservations can likewise be computed. For the Chemehuevi Reservation with 1900 acres being considered irrigable by the previous decree, every man, woman and child would have an annual income of $12,666 or $50,664 for a family of four.

On the Colorado River Indian Reservation with 107,588 acres, an annual income of $21,517,600 could be realized at $200 an acre, and with the Tribal population of 1,300 this would mean $16,552 per individual or for a family of four $66,208.

The States would also present through answers to the interrogatories and request for production those documents and witnesses to testify as to how much of the reservations are currently leased. In the case of the Colorado River Indian Reservation, the report of Boyle Engineering shows at page 10 that in 1978, 81,000 gross acres were irrigated on the reservation, 2,500 acres were farmed as a unit by the Tribe, 14,000 acres are farmed under leases to individual members of the Tribe and 65,000 acres are under long-term agricultural leases to several private growers. That totals 81,500 acres and if a value of $200 an acre for leases is ascribed to that land, gross revenues of $16,300,000 would be realized or $12,538 per individual and $50,152 for a family of four.

The States would present testimony from various government documents as to the cost of living for an individual or a family of four or other representative family. Attached hereto and made a part hereof by this reference are Exhibits "A" and "B". Exhibit "A" is poverty guidelines published in the Federal Register, volume 45 No. 78 for the continental United States in 1980. Exhibit "B" is a table from the Arizona Statistical Review that presents the budget for an urban family for maintaining an intermediate standard of living for the metro-Phoenix area and U.S. urban average.

The State parties have been precluded from pursuing the appropriate discovery methods in this matter by reason of the ruling of the Special Master in July 1980. At the time of the ruling, the States were in the process of working out the details of when and where they could go to the reservations to review the documentation as to Indian income, and would if allowed to pursue this discovery, present documentation of a nature to prove the Indian income on an individual basis, or a tribal basis, or whatever other basis the documentation would show, to indicate to the Court the income of the Indians. From that, a determination could be made as to whether or not any additional water is needed by the Indians to provide them with a moderate living, or in fact, whether or not the amounts in the 1964 Decree should be treated as maximum amounts as stated by the United States Supreme Court in the *Washington, supra,* and in fact, the Indians require less water than decreed in order to provide themselves with a moderate living.

The Master should particularly hear this issue in that an opening of the case should allow reopening for all purposes and as instructed in the *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, supra,* the Master has an obligation to determine an apportionment to meet reasonable livelihood needs of the Indians. The United States Supreme Court stated:

> In those cases, after determining at the time of the treaties the resource involved was necessary to the Indian's welfare, the Court typically ordered a trial judge or special master, in his discretion, to devise some apportionment that asserted that the Indians' reasonable livelihood needs would be met. 443 U.S. at ____, 61 L.Ed. 2d at 845.

The Master may not shirk that responsibility.

The States are prepared to show that after almost 17 years since the initial decision in this case, the Indians still have not fully developed their reservations. A fact which could well bear upon their need for any additional water, or indeed the need for the amounts of water decreed in 1964, for purposes of providing them with a "moderate living."

Dated this ____ day of September, 1980.

RESPECTFULLY SUBMITTED,

STATE OF ARIZONA

By _____
Ralph Hunsaker
Chief Counsel for the Arizona
Water Commission

Copies of the foregoing
delivered this ____ day
of September, 1980 to:

See Attached List

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Monday
April 21, 1980
4-21-80
Vol. 45 No. 79
Pages 26685-26942

EXHIBIT "A"

federal register

Highlights

26685 **Transactions with Iran** Executive Order

26940 **Iranian Assets Control** Treasury/Office of Foreign Assets issues regulations imposing additional prohibitions on dealings with Iran; effective 4-17-80 (Part VIII of this issue)

26934 **Womens' Business Enterprise Policy** EPA gives notice of intent to issue guidance concerning EPA's construction grants program (Part VII of this issue)

26705 **Education** HEW issues regulations revising sections of the fund for the improvement of postsecondary education regulations

26914 **National Diffusion Network Program** HEW/OE issues regulations governing the award of grants to public and private nonprofit agencies (Part V of this issue)

26749 **Technical Assistance and Energy Conservation Measures** DOE/SOLAR gives notice of closing date of second grant program cycle; apply by 9-30-80

26717 **Technical Assistance and Energy Conservation Measures** DOE/SOLAR publishes notice to solicit public comment concerning possible amendments to the present regulations for use in future grant program cycles; comments by 5-30-80

CONTINUED INSIDE

Discussion

In consideration of the foregoing, Part 56 of Title 46 of the Code of Federal Regulations is amended by revising § 56.50-65(a)(5) to read as follows:

§ 56.50-65 Tank vent piping.

(a) * * *

(5) Vents from fuel oil and other tanks extending above the freeboard or superstructure deck shall be of substantial construction. Except for barges in inland service and on Great Lakes vessels, the height from the deck to any point where water may gain access below deck shall be at least 30 inches on the freeboard deck, and 18 inches on the superstructure deck. On Great Lakes vessels, the height from the deck to any point where water may gain access below deck, shall be at least 30 inches on the freeboard deck, 24 inches on the raised quarterdeck, and 12 inches above other superstructure decks. Where height of vent pipes on Great Lakes vessels may interfere with the working of the vessel a lower height may be approved provided the vent cap is properly protected. Barges in inland service need provide a height of not less than 6 inches. A lesser amount may be approved if evidence is provided to the Commandant that a particular vent has proven satisfactory in service.

* * * * *

(R.S. 4405, as amended (46 U.S.C. 375); R.S. 4417, as amended (46 U.S.C. 391); 49 Stat. 1889 as amended (46 U.S.C. 391a); R.S. 4462 as amended (46 U.S.C. 416).)

Dated: April 16, 1980.

W. D. Markle, Jr.,

Captain, U.S. Coast Guard, Acting Chief, Office of Merchant Marine Safety.

[FR Doc. 80-12138 Filed 4-18-80; 8:45 am]

BILLING CODE 4910-14-M

COMMUNITY SERVICES ADMINISTRATION

45 CFR Part 1060

General Characteristics of Community Action Programs; Income Poverty Guidelines (Revised)

AGENCY: Community Services Administration.

ACTION: Final rule.

SUMMARY: The Community Services Administration is revising its income poverty guidelines. The Economic Opportunity Act of 1964, as amended, requires yearly revisions of the poverty guidelines for use by every agency administering programs under the Act in which the poverty guidelines are used to judge eligibility for participating in programs. These annual revisions assure that the income guidelines reflect the changes in the cost of living.

EFFECTIVE DATE: This rule is effective April 21, 1980.

FOR FURTHER INFORMATION CONTACT: Ms. Mary R. Ellyn, Policy, Planning and Analysis Division, Community Services Administration, Office of Policy, Planning and Evaluation, 1200 19th Street, N.W., Washington, D.C. 20506. Telephone: (202) 632-6630. Teletypewriter: (202) 254-6218.

SUPPLEMENTARY INFORMATION: The Community Services Administration revision of the updated poverty guidelines constitutes compliance with the legislatively mandated requirement of Section 624 of the Economic Opportunity Act of 1964, as amended. This revision is not significant according to Executive Order 12044 since the only change being made reflects the changes in the Consumer Price Index and is required by the previously mentioned Section of the EOA. The text defining "Income" and "A Farm Residence" remains unchanged. The policy regarding use of these guidelines is also unchanged by this revision.

This amendment to § 1060.2 revises the guidelines previously published in §§ 1060.2-1 and 1060.2-2.

Authority: The provisions of this subpart are issued under Section 602, 78 Stat. 530, 42 U.S.C. 2942.

William W. Allison,

Acting Director.

45 CFR 1060.2-1 through 1060.2-2 is revised to read as follows:

§ 1060.2-1 Applicability.

This subpart applies to all grants financially assisted under Titles II, IV and VII of the Economic Opportunity Act of 1964, as amended, if such assist is administered by the Community Services Administration.

§ 1060.2-2 Policy.

(a) The attached income guidelines are to be used for all those CSA funded programs, whether administered by a grantee or delegate agency, which use CSA poverty income guidelines as admission standards. These guidelines do not supersede alternative standards of eligibility approved by CSA.

(b) The guidelines are also to be used in certain other instances where required by CSA as a definition of poverty, e.g., for purposes of data collection and for defining eligibility for allowances and reimbursements to board members. Agencies may wish to use these guidelines for other administrative and statistical purposes as appropriate.

(c) The attached guidelines are based upon Table 17 of the U.S. Bureau of the Census, *Current Population Reports*, Series P–60, No. 120, "Money Income and Poverty Status of Families and Persons in the United States: 1978" (Advance Report), U.S. Government Printing Office, Washington, D.C., November 1979; and Department of Labor Press Release USDL–80–46 of December 1979.

(d) The following definitions, from *"Current Population Reports,"* P–60, No. 91, Bureau of the Census, December 1973 have been adopted by CSA for use with the attached poverty guidelines.

(1) *Income.* Refers to total cash receipts before taxes from all sources. These include money wages and salaries before any deductions, but not including food or rent in lieu of wages. They include receipts from self-employment or from own farm or business after deductions for business or farm expenses. They include regular payments from public assistance, social security, unemployment and workman's compensation, strike benefits from union funds, veteran's benefits, training stipends, alimony, child support and military family allotments or other regular support from an absent family member or someone not living in the household; government employee pensions, private pensions and regular insurance or annuity payments; and income from dividends, interest, rents, royalties or income from estates and trusts. For eligibility purposes, income does not refer to the following money receipts: any assets drawn down as withdrawals from a bank, sale of property, house or car, tax refunds, gifts, one-time insurance payments or compensation for injury; also to be disregarded is non-cash income, such as the bonus value of food and fuel produced and consumed on farms and the imputed value of rent from owner-occupied farm or non-farm housing.

(2) *A Farm Residence.* Is defined as any dwelling on a place of 10 acres or more with $50 or more annual sales of farm products raised there; or any place less than 10 acres having product sales of $250 or more.

Attachment.—1980 Community Services Administration Poverty Income Guidelines for all States Except Alaska and Hawaii

Size of family unit	Nonfarm family	Farm family
1	$3,790	$3,290
2	5,010	4,290
3	6,230	5,310
4	7,450	6,340
5	8,670	7,370
6	9,890	8,400

For family units with more than 6 members, add $1,220 for each additional member in a nonfarm family and $1,030 for each additional member in a farm family.

Poverty Guidelines for Alaska

Size of family unit	Nonfarm family	Farm family
1	$4,780	$4,080
2	6,290	5,370
3	7,800	6,650
4	9,320	7,930
5	10,840	9,210
6	12,360	10,490

For family units with more than 6 members, add $1,520 for each additional member in a nonfarm family and $1,280 for each additional member in a farm family.

Poverty Guidelines for Hawaii

Size of family unit	Nonfarm family	Farm family
1	$4,370	$3,780
2	5,770	4,940
3	7,170	6,120
4	8,570	7,300
5	9,970	8,480
6	11,370	9,660

For family units with more than 6 members, add $1,400 for each additional member in a nonfarm family and $1,180 for each additional member in a farm family.

[FR Doc. 80-12204 Filed 4-18-80; 8:45 am]

BILLING CODE 6315-01-M

1978 URBAN FAMILY BUDGET
FOR MAINTAINING AN INTERMEDIATE LIVING STANDARD

Item	Metropolitan Phoenix Budget	Metropolitan Phoenix % of Total	Metropolitan Tucson Budget	Metropolitan Tucson % of Total	U.S. Urban Average Budget	U.S. Urban Average % of Total
FAMILY CONSUMPTION	$15,085	76.4%	$14,736	76.5%	$14,000	75.2%
Food	4,842	24.5	4,407	22.8	4,609	24.8
Housing	4,722	23.9	4,853	25.2	4,182	22.5
Transportation	1,880	9.5	1,740	9.1	1,572	8.4
Clothing & Personal Care	1,751	8.9	1,805	9.4	1,612	8.7
Medical Care	1,039	5.3	1,025	5.3	1,070	5.7
Other Consumption	851	4.3	906	4.7	956	5.1
OTHER COSTS*	766	3.9	750	3.9	810	4.3
TAXES	3,884	19.7	3,784	19.6	3,811	20.5
Social Security & Disability	1,071	5.4	1,071	5.5	1,075	5.8
Personal Income	2,813	14.3	2,713	14.1	2,738	14.7
TOTAL BUDGET	$19,735	100.0%	$19,269	100.0%	$18,622	100.0%

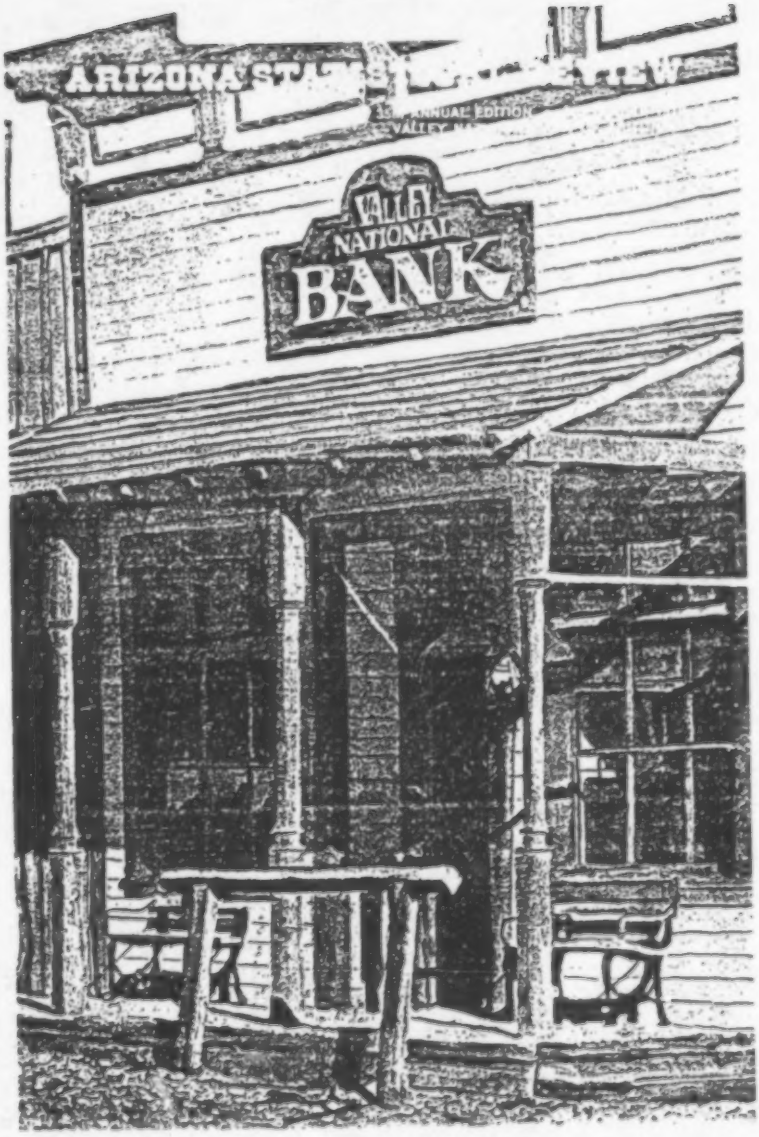
*Other Costs include gifts and contributions, personal life insurance, and occupational expenses.
Note: Columns may not add to totals due to rounding.

1978 URBAN FAMILY BUDGET
COMPARISONS FOR SELECTED U.S. CITIES

Rank	Metropolitan Area	Autumn 1978 Budget	Rank	Metropolitan Area	Autumn 1978 Budget
1.	Dallas	$16,714	13.	Cleveland	$18,987
2.	Atlanta	16,897	14.	Detroit	19,145
3.	Houston	17,114	15.	TUCSON	19,269
4.	San Diego	17,707	16.	Minneapolis-St. Paul	19,389
5.	Los Angeles-Long Beach	17,722	17.	Philadelphia	19,416
6.	St. Louis	17,897	18.	San Francisco-Oakland	19,427
7.	Pittsburgh	18,008	19.	Buffalo	19,517
8.	Kansas City	18,262	20.	PHOENIX	19,735
9.	Cincinnati	18,354	21.	Milwaukee	20,025
—	U.S. AVERAGE	18,622	22.	Washington, D.C.	20,105
10.	Seattle	18,671	23.	New York-N.J.	21,587
11.	Baltimore	18,699	24.	Boston	22,117
12.	Chicago	18,794	25.	Honolulu	23,099

Source: U.S. figures and all cities except Phoenix and Tucson by U.S. Department of Labor, Bureau of Labor Statistics. Phoenix data by Bureau of Business and Economic Research, Arizona State University, in cooperative cosponsorship with Valley National Bank. Tucson data by Division of Economic and Business Research, University of Arizona, in cooperative cosponsorship with Valley National Bank.

EXHIBIT "B"



SUPREME COURT OF THE UNITED STATES
BEFORE THE SPECIAL MASTER

OCTOBER TERM, 1979
NO. 8, ORIGINAL

STATE OF ARIZONA,
COMPLAINANT

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, AND COUNTY OF SAN DIEGO,
DEFENDANTS,

UNITED STATES OF AMERICA and STATE OF NEVADA,
INTERVENERS,

STATE OF NEW MEXICO and STATE OF UTAH,
IMPLEADED DEFENDANTS.

STATE PARTIES OFFER OF PROOF RE TECHNOLOGY AT THE TIME THE RESERVATION ARE CREATED

APPENDIX B

The States offer into evidence upon the question of the technology of the state-of-the-art of irrigation at the time the Indian reservations were created in this case, Chapter 6 of the Bookman-Edmonston Report. This chapter deals with the question of the technology at the time the reservations in this matter were created and indicate the ability or lack of ability to irrigate certain lands at the time. If allowed to pursue the matter, the States would present Chapter 6 of the Report of Bookman-Edmonston and also through the witnesses listed on behalf of Bookman-Edmonston would present to the Special Master testimony to support the claim that irrigation on Indian reservations would have been limited by technology existing at the time the reservations were created.

The ruling of the Master on July 10, 1980, precludes the States from presenting such testimony. This testimony is material on the issue of how much water Congress or the Executive impliedly intended to reserve for use on the reservations. Neither the Congress nor the Executive in creating the reservation could have intended either expressly or impliedly, to reserve the quantity of water required by some future but unknown technology of irrigation. It must be inferred, then, that the Congress and/or the Executive who created the reservation in question, could only have intended that the water to be put to use would be put to use by then known means. To do otherwise would be to leave open-ended the magnitude of the water reservation and to leave in doubt the water rights of all other developments and uses, including those reservations established subsequently. Any limiting features of the ability to use the water should necessarily be included in the implied intent at the time of the creation of the reservation. The evidence presented in Chapter 6 of the Bookman-Edmonston Report prepared on behalf of the State Parties is material to the

issue of technology as it existed at the time of the creation of the various reservations and should be received in evidence.

Both the Special Master's report and the 1963 opinions of this Court, which established present allocations, state that a specific reservation of water for Indians was required so as to not leave any potential user of water uncertain about the remaining amounts available. If this were not the case, the financing of other municipal and irrigation projects would be imapired, interest in developing projects would be stifled, and could not be undertaken with any assurance that a water supply would be available until such time as the Indian water rights were quantified and made certain. Therefore, it was imperative in the interest of the future growth that the Indian rights be quantified as of a particular point in time. As Special Master Rifkin stated at page 256 of this report:

> Furthermore, the claims of the United States to water from the Colorado River for the benefit of the Indian reservations are of such great magnitude that failure to adjudicate them would leave a cloud on legal availability of substantial amounts of mainstream water for use by non-Indian projects.

The Special Master went on to state in his analysis of *Winters v. United States*, that:

> The Supreme Court thus held that the reservation of water was effective *as of the date that the Fort Belknap reservation was created.* ... 207 U.S. at 577. (Emphasis supplied).

It should be noted that even Special Master Rifkin then erred in using the technology of the day and not that existing at the time of the creation of the reservation. This whole concept must be resisted if the 1964 Decree is reopened. The imperative requirement of certainty in reserved water rights is endangered by the United States' motion to reopen the 1964 Decree. If at every stage of technological advance the Tribes are permitted to increase their

claim to water, the certainty sought by Special Master Rifkin and the Court in *Arizona v. California* will be thwarted. Financing of irrigation projects will be subject to uncertainty of increased Tribal uses, and lenders will be unwilling to finance the construction of such projects. Likewise, planners in urban areas will be unable to depend upon a certain quantity of water for future needs. These concerns were expressed by Special Master Rifkin, and he rejected the argument that there would be a forever changing right on behalf of the Indians at page 264 of this report:

> However, such a limitless claim would place all junior water rights in jeopardy of the uncertain and the unknowable. Financing of irrigation projects would be severely hampered if investors were faced with the possibility that expanding needs of an Indian reservation might result in a reduction of the project's water supply. Moreover, it would not give the United States any certainty as to the extent of its reserved rights, which would undoubtedly hamper the United States in developing them.

Special Master Rifkin also recognized that one could only look to the intent of Congress at the time of the creation of the reservation in order to quantify the claim.

He stated at page 265 of his report:

> I hold only that the amount of water reserved, and hence, the magnitude of water rights created is determined by agricultural and related requirements, since *when the water was reserved that was the purpose of the reservation.* (Emphasis supplied).

The United States, however, would have the Special Master allow speculation in the evaluation of these reserved rights, by contending that Congress or the Executive intended to reserve in accordance with future conditions they knew nothing about. This approach was rejected in *Arizona*

v. California when it was argued that the quantity of water reserved to the Tribes should be measured by their "reasonably foreseeable needs." The Court said with respect to this argument:

> How many Indians there will be and what their future needs will be can only be guessed. 373 U.S. at 600-601.

The same is true with respect to changing technology. If the acreage was not irrigable under the technology that existed at the time of the creation of the reservation, this Court should not infer guesswork on the part of Congress or those who prepared a treaty, to indicated that if the technology of irrigation were to change, the quantity of water impliedly reserved would also change.

Additional grounds for rejection of the Tribes' position is provided by the doctrine of prior appropriation. Allocation of water in nearly all Western states is based on established usage, in order to provide certainty to all users, present and future, of available supplies. The "reserved rights" doctrine is not based on actual use; therefore, some other basis to provide this ongoing certainty of supply had to be developed. The 1964 Decree established this format, by basing allocations upon an existing set of circumstances not subject to change, unless the level was inadequate to provide the Tribes with a moderate standard of living (see subheading III, supra). The Decree should not be distrubed on this basis, unless the 1964 Decree is revised to recognize technology and conditions when each reservation was created.

The evidence the State Parties seek to present would establish the practicably irrigable acreage on the five reservations in question at the time those reservations were created. In a report prepared for the Arizona Water Commission, the Bookman-Edmonston Engineering Corporation analyzed this question, factoring in knowledge of the tech-

nological state-of-the-art and the physical conditions prevailing at the time each reservation was established. This type of evidence will demonstrate the technology upon which Congress' implied reservation of water was based.

DATED THIS 2nd day of September, 1980.

Respectfully submitted,

STATE OF ARIZONA

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